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IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-324

FRANK PIERORAZIO and JESSE CAPPS,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

FRANK PIERORAZIO and JESSE CAPPS, your Petitioners, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on May 31, 1978.

OPINIONS BELOW.

On May 31, 1978, the United States Court of Appeals for the Third Circuit published its opinion which has not yet been officially reported (App. A, *infra*, pages A1-A9), affirming the judgments of conviction and sentences entered by the United States District Court for the Eastern District of Pennsylvania on April 25, 1977. On that date,

the Honorable Donald W. VanArtsdalen, Judge for the United States District Court for the Eastern District of Pennsylvania had sentenced Petitioner Pierorazio to a term of imprisonment of 3½ years and Petitioner Capps to a term of imprisonment of 2 years, each followed by a special parole term of 2 years, after denying post-trial motions. No opinion was filed by the District Court. Copies of the Judgment and Commitment Orders are reproduced herein as App. B, *infra*, pages A12-A15).

JURISDICTION.

The Order of the United States Court of Appeals for the Third Circuit (App. A, *infra*, pages A10-A11) affirming the judgment of the District Court, was entered on May 31, 1978. A timely petition for reargument was denied by the Court on June 27, 1978 (App. C, *infra*, pages A16-A17). On July 19, 1978, Mr. Justice Brennan extended the time for filing this petition up to and including August 26, 1978 (App. D, *infra*, page A18). This court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Can the Drug Abuse Act, 21 U. S. C. § 843(b), be interpreted to sustain a conviction for using a communication facility to facilitate a felony under that Act, based solely on proof of an underlying inchoate crime such as an attempt or conspiracy?

2. Can the federal conspiracy doctrine be extended to sustain a conviction, under § 846 of the Drug Abuse Act, for conspiracy to possess methamphetamine, where there was no proof that anyone actually possessed, transferred or even discussed methamphetamine and therefore there was no proof that possession of methamphetamine was the specific object of the conspiracy?

3. Does Title III of the Omnibus Crime Control and Safe Streets Act of 1968 sanction the use of recorded conversations obtained pursuant to court authorized wiretap, where the affidavit incorporates an earlier affidavit by a different affiant, thus containing multiple hearsay, where the affidavit fails to set forth underlying facts to show that normal investigative techniques have been tried and failed, and where the tapes were not "immediately" sealed and filed w[illegible] the Court?

4. Where a prosecutor in his opening speech refers to the anticipated testimony of a witness who does not thereafter actually testify at trial, and where the prosecutor could not have reasonably expected that the witness would testify, does this constitute prosecutorial misconduct and thus deprive Petitioners of their constitutional right to confront and cross-examine witnesses and deprive them of a fair trial?

CONSTITUTIONAL PROVISION, STATUTES AND FEDERAL RULE INVOLVED.

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence."

The Drug Abuse, Prevention and Control Act of 1970 provides, in pertinent part:

> 21 U. S. C. § 841. Prohibited acts A-Unlawful acts
>
> "(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> > (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. . . ."
>
> 21 U. S. C. § 843. Prohibited Acts C-Unlawful Acts
>
> ". . .
>
> "(b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this . . . chapter. . . . For purposes of this subsection, the term 'communication facility' means any and all public and private instrumentalities used or useful in the transmission of . . . sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

> "(c) Any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine of not more than $30,000, or both. . . ."
>
> 21 U. S. C. § 846. Attempt and Conspiracy
>
> "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

Title III of the Omnibus Crime Control and Safe Streets Act provides, in pertinent part:

> 18 U. S. C. § 2518. Procedure for interception of wire or oral communications
>
> "(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> . . .
>
> > "(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;
>
> . . .
>
> "(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of

the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

. . .

"(10) (a) Any aggrieved person in any trial hearing, or proceeding in or before any court . . . may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

. . . ."

The Federal Rules of Criminal Procedure provide, in pertinent part:

Rule 29. Motion for Judgment of Acquittal

"(a) Motion before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

. . .

"(c) Motion after Discharge of Jury. If the jury returns a verdict of guilty . . . a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7 day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury."

STATEMENT OF THE CASE.

(a) The Proceedings.

After learning that an indictment had been returned against them, both Petitioners surrendered themselves accompanied by counsel. The first count of the indictment charged 11 persons with conspiracy under 21 U. S. C. § 846, seven (including these two Petitioners) as defendants and four as unindicted co-conspirators. The indictment charged that the object of the conspiracy was to possess and distribute methamphetamine, a schedule II controlled substance, in violation of 21 U. S. C. § 841 (a)(1). The remaining 11 counts each charged one or more defendant with using a communication facility, namely a telephone, in facilitating the commission of the felony of possessing and distributing methamphetamine, a Schedule II controlled substance, in violation of 21 U. S. C. § 843(b). Petitioner Pierorazio was named in 10 of these counts and Petitioner Capps in one.

Both Petitioners, along with two other named defendants, were scheduled for trial before United States District Judge Donald W. VanArtsdalen. Prior to trial, they filed a number of motions, including, *inter alia*, a motion to suppress evidence obtained by wiretaps, and a motion to dismiss the indictment. A pretrial hearing on the motion to suppress was held before United States District Judge Alfred L. Luongo; on December 7, 1976, Judge Luongo filed an Order denying the motions. The case was called for trial in January, 1977. Prior to commencement of trial, Judge VanArtsdalen denied all of the remaining motions.

Testimony was presented for approximately four days; at the close of the government's case the court denied motions by all defendants under Rule 29 for judgments of acquittal. Some defense testimony was presented, and the

motions were renewed and again denied, although the court did enter judgments of acquittal on three counts (all three involving Petitioner Pierorazio, one of them involving Petitioner Capps). The court also struck two overt acts from the conspiracy charge. The jury retired and, after deliberating for more than 1½ days, announced that it was unable to agree on a verdict as to any defendant on any count. Accordingly, a mistrial was declared.

Thereafter, Petitioners renewed their motions for judgments of acquittal under Rule 29 and renewed their motion to suppress the wiretapped evidence because of a violation of the statute dealing with the requirement for prompt sealing and filing of the tapes based on evidence which had come to their attention during the first trial. All of these motions were denied. The government decided to drop charges against the other two defendants, and to move against these Petitioners on only three counts: on count 1, charging both Petitioners with conspiracy, and on two substantive counts against Petitioner Pierorazio. After another trial the jury deliberated for more than one day and found both Petitioners guilty on all three counts. Post-verdict motions were filed, argued and denied. Petitioner Pierorazio was sentenced to concurrent terms of imprisonment for 3½ years on each count, followed by a term of Special Parole for two years, and Petitioner Capps was sentenced to a term of imprisonment for two years, followed by a term of Special Parole for two years.

Timely notices of appeal to the Third Circuit were filed on behalf of both Petitioners. Counsel was appointed for Petitioner Capps (who at this time obtained leave to proceed in forma pauperis) and both Petitioners were permitted to file a consolidated brief and appendix. After oral argument, the Court of Appeals affirmed the judgments of conviction and sentences. A timely petition for reargument

was filed and denied. The time for filing this Petition was extended by Mr. Justice Brennan.

(b) Evidence at Both Trials.

The evidence offered at both trials was virtually identical. It consisted primarily of tape recorded telephone conversations, recorded pursuant to court authorized wiretaps, some of them between the Petitioners and some between one or both Petitioners and other persons. During none of those conversations was any drug or controlled substance specifically mentioned (with the exception of one discussed below). Therefore, testimony of DEA agents was introduced to interpret what they claimed to be coded phrases or words used by the participants in those conversations, allegedly referring to transactions relating to controlled substances. There was testimony of one surveillance which the government offered as proof of an overt act in aid of the charged conspiracy, during which the two Petitioners traveled to a farm outside Philadelphia, during which time they were seen entering and leaving their vehicle, removing some furniture from the trunk of the car at the farmhouse, and allegedly carrying a small paper bag, the contents of which were unidentified. At no time were any controlled substances observed on or in the possession of either Petitioner or anyone else at the farm during this surveillance, nor was any conversation overheard which related to controlled substances. There was testimony relating to another survillance which took place following a wiretapped telephone conversation between Petitioner Pierorazio and an unidentified female, following which one of the agents sped to Pierorazio's home and observed a young lady ring his door bell and receive something from an unidentified occupant of the residence. However, no arrests were made, no one was seen in physical possession of any controlled substances, and no controlled substances

were found on the premises or in possession of the young lady at that or any other time. The young lady was never identified by the government nor produced at trial. There were several other surveillances testified to, which did not result in the discovery of any controlled substances or any illegal activity.

During none of the many recorded conversations played at both trials was there any specific mention of a controlled substance, with the exception of one call when an unidentified female named Madeline spoke to Petitioner Pierorazio and indicated that another female wanted methamphetamine. In that conversation, the female told Petitioner Pierorazio that Petitioner Capps can have another female's ice cream parlor set for meth. However, according to the transcript Petitioner Pierorazio said "He has nothing now", and no agreement was reached. This conversation was the basis of one of the counts in the indictment which at the close of the first trial were dismissed against Petitioner Pierorazio, with the consent of the government. Nonetheless, the conversation was admitted in evidence, over objection, at the second trial.

The agent who was the affiant to the application for the second wiretap, and who admitted, during the suppression hearing, making material misstatements in his affidavit, testified at the second trial, whereas he had not testified at the first trial; however, his testimony added nothing substantively to the proceedings. In the opening speech, the prosecutor also referred to the anticipated testimony of an alleged co-conspirator, Rosemary Schulz, whom he expected to call at trial; however, when he did attempt to call her at trial, after a hearing outside the presence of a jury, she attempted to invoke her constitutional right not to testify, despite a grant of immunity. She was jailed, but did not testify. In all other respects, the testimony offered at both trials was substantially similar.

REASONS FOR GRANTING THE WRIT.

This Petition raises four important and unsettled questions of law and procedure involving the interpretation of important federal statutes: whether a conviction for using a communication facility to facilitate the felony of possession of controlled substance can be sustained without proof that there was actual possession of any controlled substance; whether there can be a conviction for conspiracy to possess a specific controlled substance, namely methamphetamine, without proof that any one actually possessed any methamphetamine or that methamphetamine was the specific subject of the conspiracy; whether the wiretaps complied with the requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, even though the affidavit for the second wiretap attempted to incorporate an earlier affidavit by another affiant, the affidavit did not set forth sufficient evidence to show that normal investigative techniques had been tried and failed, and the tapes were not promptly sealed and filed with the Court as required by the Act; and whether Petitioners were deprived of a fair trial by the prosecutor's misconduct in referring in his opening speech to testimony of an anticipated witness whom he knew or had reason to believe would not actually testify at trial and who did not testify at the trial.

1. There Can Be No Conviction for Using a Communication Facility to Facilitate a Felony Under the Drug Abuse Act Based on Proof of an Underlying Inchoate Crime Such as an Attempt or Conspiracy.

Petitioner Pierorazio was found guilty on two substantive counts charging the use of a communication facility in facilitating the commission of a felony under the Drug Abuse Act, 18 U. S. C. § 843(b). The evidence offered to sustain this conviction consisted of telephone

calls between Petitioner Pierorazio and two others, not defendants in the case. During the conversation, controlled substances were not specifically mentioned, but a DEA agent testified that some of the terms used were codes for suggesting that drugs were the subject of the conversations. At no time during these conversations was the specific controlled substance, methamphetamine, mentioned. In fact, at no time during the entire trial was any defendant or anyone else found in possession of methamphetamine or any other controlled substance. Only once during the several hundred monitored telephone conversations was methamphetamine specifically mentioned—and that was a conversation in which an unidentified female speaking to Petitioner Pierorazio, says that Petitioner Capps can have an ice cream parlor set for meth. Pierorazio responded that: "He has nothing now," and no agreement was reached, and no transfer was observed taking place. At no time during the several surveillances was anyone seen in possession of any controlled substance.

Thus, there was no evidence of any acts, distribution or possession with intent to distribute methamphetamine or any other controlled substance arising out of those telephone conversations comprising these substantive counts.

The Court of Appeals sustained the conviction on the ground that Section 843(b) of the statute can be violated upon proof of an underlying inchoate crime such as an attempt or conspiracy under Section 846, without evidence of an actual consummated distribution.[1] In so doing the

1. The Court concluded, in footnote 3, that the record was sufficient to support a finding of attempt. Petitioners respectfully but vehemently disagree, since there was no evidence on which a jury could base a finding of the essential elements, including "substantial steps," "strongly corroborative of the defendant's criminal intent," to possess methamphetamine, as required by the cases. See *United States v. Mandujano*, 499 F. 2d 370 (5th Cir.), *cert. denied*, 419 U. S. 1114 (1974); *United States v. Rivero*, 532 F. 2d 450 (5th Cir. 1976).

Court rejected the reasoning of two separate District Judges in the Third Circuit who had considered the question and come to a contrary conclusion.

In *United States v. Leslie,* 411 F. Supp. 215 (D. Del. 1976), Judge Stapleton concluded that when in 1970 Congress revised former Section 1403 and codified it in Section 843(b), it intended to deprive the government of the use of Section 843(b) to penalize the use of a communication facility to attempt to commit any act or conspiracy to commit such act constituting a specified narcotic offense. He concluded that Congress simultaneously adopted Section 846 which punished that conduct. Likewise, District Judge Cahn, in *United States v. Harrington,* Crim. No. 77-86 (E. D. Pa. February 23, 1978), adopted Judge Stapleton's reasoning that any crime used as the basis for the facilitation charge must constitute an offense. In so doing, Judge Cahn rejected the contrary reasoning of the Courts of Appeals in *United States v. Turner,* 528 F. 2d 143, 164 (9th Cir.), *cert. denied, sub nom. United States v. Grimes,* 423 U. S. 996 (1975), and *United States v. Steinberg,*[2] 525 F. 2d 1126, 1133 (2nd Cir. 1975), *cert. denied,* 425 U. S. 971 (1976). He also distinguished the cases of *United States v. Losing,* 560 F. 2d 906, 913 (8th Cir.), *cert. denied,* 54 L. Ed. 2d 457 (1977) and *United States v. Jones,* 545 F. 2d 1112 (8th Cir. 1976), *cert. denied,* 429 U. S. 1075 (1977), which upheld the facilitation of conspiracy convictions without discussion.

The Court of Appeals concluded that *Leslie* and *Harrington* ignored the plain language of the statute and concluded that proof of an underlying inchoate crime such as attempt or conspiracy under Section 846 is sufficient to sustain a facilitation conviction under Section 843(b), and it

2. Judge Cahn notes, at footnote 5 of his opinion that the *Steinberg* Court recognized that its ruling is contrary to the "canons of statutory construction." 525 F. 2d, at 1133.

is therefore not necessary that an actual, consummated distribution be shown. In so concluding, it stated that it was in accord with other Courts of Appeals which have considered the question, citing *Losing, Turner, Jones* and *Steinberg,* as well as *United States v. Rodriguez,* 546 F. 2d 302 (9th Cir. 1976); *United States v. Kirk,* 534 F. 2d 1262 (8th Cir. 1976), *cert. denied,* 433 U. S. 906 (1977); and *United States v. Sisca,* 503 F. 2d 1337 (2nd Cir.), *cert. denied,* 419 U. S. 1008 (1974) (although it noted that *Sisca* and *Kirk* affirmed Section 843(b) where the underlying felony was conspiracy under Section 846 and neither discussed the question presented in the case at bar).

These cases demonstrate that not only is there a conflict between the reported decisions considering this question, but that the question is important and recurring, and should be settled by this Court to provide uniformity of decision throughout the country.

2. A Conviction for Conspiracy to Possess Methamphetamine Cannot Be Sustained Without Proof Beyond a Reasonable Doubt That Possession of Methamphetamine Was the Specific Object of the Conspiracy.

Both Petitioners were convicted of conspiracy to knowingly and intentionally possess and distribute diverse quantities of methamphetamine. Hence, the existence of a conspiracy to possess and distribute controlled substances other than methamphetamine could not support a conviction under count 1. In the case at bar, under count 1 the government had the burden of proving beyond a reasonable doubt not only that a conspiracy existed but that methamphetamine was the drug involved in that conspiracy. It is but a truism to state that "where one conspiracy is specifically charged, proof of different and disconnected ones will not sustain a conviction." *United States v. Bostic,* 480 F. 2d

965 (6th Cir. 1973); *United States v. Goodson*, 502 F. 2d 1303 (5th Cir. 1974).

Yet the record fails to show the existence of the specific conspiracy charged in the indictment, since, as already noted, no methamphetamine was ever confiscated by the government, no witness was produced at trial to testify from first hand knowledge as to the existence of methamphetamine, no one specifically mentioned methamphetamine during hundreds of monitored telephone conversations, and no surveillance ever observed Petitioners or any other defendant or unindicted co-conspirator to be in possession of methamphetamine. From the evidence offered, including the testimony of the agents, the jury could only guess that the conversations related to controlled substances of any kind, and it was mere conjecture or surmise that such conversations related specifically to methamphetamine, as charged in the indictment.

The question posed to this Court is how far the doctrine of proving membership in a conspiracy by slight evidence can be stretched to relieve the prosecution in a conspiracy case of the burden of proving every element of the offense charged beyond a reasonable doubt. In *United States v. Cooper*, 567 F. 2d 252 (3rd Cir. 1977),[3] the Third Circuit reversed a conspiracy conviction on what may be considered as stronger evidence than that involved in the case at bar, noting that it would be reversible error to charge a jury that once the government has shown the existence of a conspiracy it may connect a particular defendant to it by "slight evidence" rather than by evidence proving the connection beyond a reasonable doubt, citing *United States v. Partin*, 552 F. 2d 621, 628 (5th Cir. 1977), *cert. denied*, 54 L. Ed 2d 189 (1977).

3. The *Cooper* case was officially reported after the brief had been submitted in the case at bar and was not argued before the Panel; it was raised for the first time in the petition for rehearing in banc on behalf of Appellants.

Thus, the Third Circuit Panel in the case at bar deviated from the principle enunciated in *Cooper*, and this Court should review, both to prevent manifest injustice and to clarify the apparent conflict by the decisions in this Circuit.

3. The Wiretap Did Not Comply With Title III, Because the Affidavit Incorporated an Earlier Affidavit by Another Affiant, the Affidavit Failed to Set Forth Underlying Facts Showing That Normal Investigative Techniques Had Been Tried and Failed, and the Tapes Were Not Promptly Sealed and Filed With the Court.

A. The vast majority of the evidence in the case at bar consisted of monitored conversations recorded during the course of two court authorized wiretaps. The first tap was signed by Judge Weiner on June 1, 1976 authorizing a tap at a garage at 31 E. Wildey Street, Philadelphia, Pa. Some time after it was installed, the agents learned that a call forwarding service existed on that phone,[4] and that most telephone calls were being forwarded to another location and could not be intercepted at the tapped phone. Accordingly, the government prepared a second application for interception of wire communications, which was approved by District Judge Alfred L. Luongo, authorizing interception of a telephone located at 1847 Tulip Street, Philadelphia, Pa., the residence of Petitioner Pierorazio. The affidavit to the second application merely incorporated the affidavit to the first, then added a few additional facts, the most significant of which related to two alleged telephone calls received during the first wiretap and which were allegedly drug related. At the hearing on the motion

4. This is a service provided by the Telephone Company for a fee to thousands of people in that area, which automatically switches incoming calls to another location, upon the dialing of a coded number.

to suppress, during cross-examination the affiant admitted that these conversations were not actually drug related, that he had learned that before signing a subsequent minimization affidavit, and had still persisted in the misstatements contained therein and during his direct testimony at the suppression hearing.

The affidavit seeking the first wiretap at the Wildey Street garage admittedly did not contain sufficient probable cause to obtain a wiretap at the Tulip Street residence; in fact, the government did not seek authorization to tap at Tulip Street. Without referring to the first affidavit, there were insufficient additional allegations contained in the second affidavit to constitute probable cause for issuing the wiretap for the Tulip Street residence—especially if the Court were to ignore the misleading statements contained therein, as provided in *Franks v. Maryland*, 23 Cr. L. 3179 (S. Ct. U. S., June 26, 1978).

Thus, the question before this Court is whether an affidavit can merely incorporate the allegations contained in an earlier affidavit taken by another agent. The incorporation of that earlier wiretap not only constitutes double hearsay, but in many instances represents multiple hearsay, since the affidavit set forth information supplied by alleged informants. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 does not by its terms authorize such loose conduct.

This Court has required strict adherence to the procedural steps provided in Title III, which absolutely prohibits electronic surveillance by the government except under carefully defined circumstances and after securing judicial authorization. See *United States v. Giordano*, 416 U. S. 505 (1974); *United States v. Eastman*, 465 F. 2d 1057 (3rd Cir. 1972). The Act has been declared constitutional only because of its precise requirements and its provisions for close judicial scrutiny. *Berger v. United States*, 388

U. S. 44 (1967); *Katz v. United States*, 389 U. S. 347 (1967).

The situation here presented is essentially the obverse of that presented in *Calhoun v. Maryland*, 34 Md. App. 365, 367 A. 2d 40 (1977). There the issue to be decided by the court was whether the affidavit upon which the application for a wiretap order was defective for failing to comply with Title III, notwithstanding the prior *valid* affidavits and orders which had been incorporated therein by reference. The state, in *Calhoun*, made an application, supported by a valid affidavit and obtained an order thereon for a telephone on East Baltimore Street. Thereafter, it sought a new order for a location on McClean Boulevard, and in the affidavit in support thereof, attempted to fuse the allegations of the first affidavit, that normal investigative procedures would not be successful, by incorporating the prior affidavit by reference. The court invalidated the wiretap and reversed the conviction, holding that the fact that the initial affidavit is legally sound does not mean that all subsequent affidavits, even in a continuing investigation, are also sufficient. It stated that each affidavit must stand on its own foundation. That a prior affidavit for another time and another place demonstrates that normal investigative measures are unlikely to be successful, even when incorporated by reference, does not comply with the strict requirements of the Act. The statute sets up a strict procedure that must be followed and no deviation however slight from its prescribed path will be permitted.

In the case at bar, where the first affidavit is also attacked as invalid, *a fortiori* the incorporation in the second application of the first invalid authorization would render the second application invalid.

B. Title III provides that, in issuing a wiretap order, the Judge shall determine whether normal investigative

techniques have been tried and failed or reasonably appear to be unlikely to succeed if tried. 18 U. S. C. § 2518 (3)(c). In the case at bar, the allegations contained in the affidavit seeking the wiretap involved consist of mere conclusory allegations without specific factual predicates.[5] Even that bald conclusion is refuted by the allegations of the affidavit which set out in detail various investigative techniques which had already proved successful. Even if the affidavit were deemed to incorporate the allegations of the earlier affidavit for the wiretap on the Wildey Street garage, a technique which has been held not permissible in *Calhoun v. Maryland, supra,* the allegations of the first affidavit likewise refute the legal conclusions, since they show investigative techniques which had proved successful to the extent they had been attempted.

However, the Circuits have differed in their formulation of a standard to be applied in determining whether the requirements of Section 2518(3)(c) have been met. In *United States v. Spagnuolo,* 549 F. 2d 705 (9th Cir. 1977), the Ninth Circuit reviewed that Circuit's earlier decision in *United States v. Kalustian,* 529 F. 2d 585 (9th Cir. 1975) and many other cases in the Ninth and other Circuits,[6] and concluded that the affidavits did not meet the

5. The affidavit in question for the tap on the Tulip Street residence merely contained the following statement:

"Normal investigative procedures reasonable appear unlikely to succeed if tried."

6. These include:

United States v. Kerrigan, 514 F. 2d 35 (9th Cir.) *cert. denied,* 423 U. S. 924 (1975);

United States v. Feldman, 535 F. 2d 1175 (9th Cir. 1976);

United States v. Turner, 528 F. 2d 143 (9th Cir), *cert. denied, sub nom. United States v. Grimes,* 423 U. S. 996 (1975);

United States v. Sandoval, 550 F. 2d 427 (9th Cir. 1976);

United States v. Anderson, 542 F. 2d 428 (7th Cir. 1976);

United States v. DiMuro, 540 F. 2d 503 (1st Cir. 1976);

standard set forth in the statute requiring a full and complete statement of whether or not other investigative procedures had been tried and failed or why they reasonably appear unlikely to succeed if tried. The Court noted that an affidavit based solely on conclusions unsupported by particular facts gives no basis for a determination of compliance with the statute. The Court there pointed out that a good faith effort to determine the identity of those violating the law and to assemble sufficient evidence to justify the prosecution must be made, but need not exhaust all possible uses or ordinary techniques.

The Third Circuit, on the other hand, had adopted what it terms a "pragmatic" approach, and requires only that the government's showing is to be "tested in a practical and common sense fashion." *United States v. Vento,* 533 F. 2d 838, 849 (3rd Cir. 1976), citing *United States v. Armocida,* 515 F. 2d 29, 37-38 (3rd Cir. 1975), and cases in other Circuits.[7] Thus, it is clear from the number and

6. (Cont'd.)

United States v. Adams, 536 F. 2d 303 (9th Cir. 1976);

United States v. Pezzino, 535 F. 2d 483 (9th Cir. 1976);

United States v. Smith, 519 F. 2d 516 (9th Cir. 1975);

United States v. Scully, 546 F. 2d 255 (9th Cir. 1976); and

United States v. Matya, 541 F. 2d 741 (8th Cir. 1976).

7. The Court in its opinion referred to the following cases and references:

In Re Dunn, 507 F. 2d 195, 197 (1st Cir. 1974);

United States v. James, 494 F. 2d 1007, 1015-1016 (D. C. App.), *cert. denied,* 419 U. S. 1020 (1974);

S. *Rep. No. 1097,* 90th Cong., 2d Sess. (1968), reprinted in 1968, *United States Code Cong. & Admin. News,* pp. 2122, 2190;

United States v. Pacheco, 489 F. 2d 554-565 (5th Cir. 1974), *cert. denied,* 421 U. S. 909 (1975);

United States v. Falcone, 364 F. Supp. 877, 889 (E. D. Pa. 1973), *aff'd,* 505 F. 2d 478 (3rd Cir. 1974), *cert. denied,* 420 U. S. 955 (1975);

United States v. Staino, 358 F. Supp. 852-856 (E. D. Pa. 1973);

divergence of opinions concerning this issue that this is a recurring and important problem of statutory interpretation which can only be resolved by this Court.

C. The Court authorized two wiretaps in the instant case. The first wiretap began on June 2 and ended on June 21, 1976, whereas the second wiretap commenced on June 16 and was completed on July 2. Three tape recordings were made of each intercepted telephone call—the original, a duplicate and a work copy. The original tapes were removed from the recorders,[8] initialled, dated and placed in a separate sealed envelope and then stored in a cabinet in the monitoring room. The duplicate tapes, upon their removal from the recorders, were initialled and dated, but were not sealed in evidence envelopes. Neither were the work copies sealed in envelopes. Any person in the monitoring room, and this included at least 14 agents assigned there, had access to the cabinet where the sealed

7. (Cont'd.)
United States v. Whitaker, 343 F. Supp. 358, 362-363 (E. D. Pa. 1972), *rev'd on other grounds*, 474 F. 2d 1246 (3rd Cir.), *cert. denied*, 412 U. S. 950, 953 (1973);
United States v. Curreri, 388 F. Supp. 607, 620-621 (D. Md. 1974);
United States v. Kerrigan, supra, note 6;
United States v. Schaefer, 510 F. 2d 1307-1310 (8th Cir.), *cert. denied*, 421 U. S. 975-978 (1975);
United States v. Brick, 502 F. 2d 219, 224 (8th Cir. 1974);
United States v. O'Neill, 497 F. 2d 1020, 1025 (6th Cir. 1974);
United States v. Bobo, 477 F. 2d 974, 982-983 (4th Cir. 1973), *cert. denied*, 421 U. S. 909 (1975);
United States v. Turner, supra, note 6;
United States v. Robertson, 504 F. 2d 289-293 (5th Cir. 1074), *cert. denied*, 421 U. S. 913 (1975);
United States v. Baynes, 400 F. Supp. 285, 298-300 (E. D. Pa.), *aff'd* by Judgment Order dated June 27, 1975.

8. For the second wiretap, the tapes were removed from the recorders daily; for the first wiretap, the tapes were removed from the recorders after a number of days.

tapes were stored. Likewise, the duplicate unsealed tapes were accessible to all agents. The envelopes containing the original tapes of the first wiretap (June 2-June 21) remained in the cabinet in the monitoring room until July 2 whereupon they were relinquished to the Clerk of Courts. The envelopes containing the original tapes of the second wiretap (June 16-July 2) remained in the cabinet in the monitoring room until July 2 whereupon the agent removed them to his locker and kept them locked up for five days before relinquishing them to the Clerk of Courts.

All conversations transposed on to the composite tape played for the jury came from the second wiretap although certain conversations from the first wiretap were used in obtaining authorization for the second wiretap. After the original sealed tapes submitted to the Court were inspected by counsel, the following irregularities were observed:

1. One of the sealed original tapes was blank, although the government did introduce into evidence a conversation that purportedly occurred during the recording of this tape;

2. One of the sealed original tapes contained only a portion of the conversation that existed on the duplicate tape;

3. One of the sealed "original" tapes was not in an envelope designating it as an original, but was marked as a "duplicate."

After the expiration of the first wiretap there was a minimum of an 11 day delay in filing the tapes (and a maximum of 30 days, from the date of the first wiretap); after the expiration of the second wiretap, there was a minimum 5 day delay (and a maximum of 22 days from the date of the earliest tape). The relevant statute, 18

U. S. C. § 2518(8)(a), requires that the recordings shall be made available to the judge and sealed under his directions "immedately upon the expiration of the period of the order." The question here is whether the practice utilized by the agent constituted compliance with the statute.

Again there is a divergence of opinions amongst the courts which have interpreted the "immediate" sealing requirement of the statute. The Third Circuit, in *United States v. Falcone*, 505 F. 2d 478, 484 (3rd Cir. 1974), *cert. denied*, 420 U. S. 955 (1975), held that:

> "Where the Trial Court has found that the integrity of the tapes is pure, a delay in sealing the tapes is not, in and of itself, sufficient reason to suppress the evidence obtained therefrom." [9]

The majority of the Panel in that case concluded that since the sealing requirement was instituted to insure the integrity of the tapes *after interception*, it was not intended to "limit the use of intercept procedures" hence a failure to seal properly and promptly did not necessitate suppression. Judge Rosenn dissented on the ground that Congress clearly intended the presence of the seal or a satisfactory explanation for the absence thereof to be a prerequisite for the use or disclosure of the contents of any wire communication or evidence derived therefrom. He found unsatisfactory the explanation for delay in sealing, namely, that time was needed to make a composite tape and to transcribe certain tapes.

Other Circuits have followed Judge Rosenn's approach. See *United States v. Gigante*, 538 F. 2d 502 (2nd Cir. 1976). That Court concluded that the judicial sealing requirement provides an external safeguard against tampering with or manipulation of recorded evidence. In *United States v. Lawson*, 545 F. 2d 557 (7th Cir. 1975), the court disagreed with the Third Circuit's approach. The Fifth Circuit has dealt with the issue of delay rather ambiguously. See *United States v. Cohen*, 530 F. 2d 43 (5th Cir.), *cert. denied*, 429 U. S. 855 (1976) where the court found no violation because the parties stipulated as to the chain of custody and lack of alteration of the tapes, and *United States v. Sklaroff*, 506 F. 2d 837 (5th Cir.) *cert. denied*, 423 U. S. 874 (1975), where no error was found because there was no showing that the integrity of the recordings had been violated, there was no showing of prejudice to the defendants, and half the delay was for the purpose of preparing the search warrant.

In *United States v. Poeta*, 455 F. 2d 117 (2nd Cir.) *cert. denied*, 406 U. S. 948 (1972), there was found a satisfactory explanation, due to the ambiguity of the wording of the state wiretap statute; *compare United States v. Ricco*, 421 F. Supp. 401 (S. D. NY 1976) and *People v. Blanda*, 80 Misc. 2d 79, 362 N. Y. S. 2d 735 (Sup. Ct. 1974).

Also see *United States v. Cannon*, 404 F. 2d 841 (N. D. Ala. 1975) and *United States v. Lanza*, 349 F. Supp. 929-931 (M. D. Fla. 1972).

The need for clarification of Title III's requirement has been discussed at length in a Note appearing in the ABA Criminal Justice Section publication, entitled *Judicial Sealing of Tape Recordings Under Title III—a Need for Clarification*, 15 AMER. CRIM. L. REV. 89 (1977), which highlights the conflict between the *Gigante* decision and the Third Circuit's approach in *Falcone*.

Only this Court can resolve the conflict and establish uniformity of decisions throughout the country.

9. It should be noted that in the case at bar the tapes were not "pure"—that is, there were a number of irregularities, described above, which give rise to a question as to the integrity of those tapes. Nevertheless, the Court of Appeals concluded only that this claim lacked merit.

4. Petitioners Were Deprived of a Fair Trial and Their Constitutional Rights of Confrontation and Cross-Examination by the Prosecutor's Misconduct in Referring in His Opening Speech to Testimony of a Witness Who Did Not Testify at Trial.

In the government's opening remarks to the jury, the Assistant United States Attorney stated that:

> "And it's also the government's expectation that you will hear at least one of the participants in the telephone calls, other than Mr. Capps and Mr. Pierorazio, a person by the name of Rosemary Schulz, testify as to her involvement in a particular telephone call with the defendant Frank Pierorazio."

The government never offered Rosemary Schulz' testimony to the jury as this witness refused to testify though granted an order of immunity. Defense counsel timely moved for a mistrial due to the variance in the evidence outlined in the government's opening argument and the evidence actually adduced at trial.

Of extreme importance here is the fact that at the time of his opening remarks, the prosecutor could *not* have reasonably expected to produce Schulz' testimony at trial. Schulz was not called to testify in the prior trial against Petitioners which had resulted in a hung jury. Furthermore, several weeks prior to the instant opening remarks, Schulz advised the government prosecutor of her refusal to testify, which alarmed this prosecutor enough for him to threaten that should she refuse to testify, she would be sent to jail for a violation of probation. The record is silent as to whether the prosecutor thereafter, and prior to trial, contacted Schulz or her attorney regarding her threatened refusal to testify. Yet the day after making her opening

remarks, the prosecutor was aware of, and thereupon advised the trial judge of, Schulz' refusal to testify. Given this factual background, it is hard to imagine how this prosecutor, who was recently severely criticized for prosecutorial improprieties in his opening remarks in *United States v. DeRosa,* 548 F. 2d 464 (3rd Cir. 1977), could have *reasonably* expected to produce Schulz' testimony at trial.

A variance between the prosecutor's advance description to the jury of the evidence to be presented, and the actual presentation, raises both the spectre of prosecutorial misconduct, and deprivation of the Sixth Amendment's Constitutional guarantee of the right of confrontation.

The prosecutorial misconduct issue was recently discussed in *United States v. DeRosa, supra,* which was decided by the Third Circuit on the day that the first trial in this case commenced and which was obviously familiar to this prosecutor at the time the second trial commenced two months later. In that case, the Third Circuit, quoting from Chief Justice Burger's concurring opinion in *United States v. Dinitz,* 424 U. S. 600, 612 (1976), stated that:

> "An opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument. *To make statements which will not or cannot be supported by proof, is, if it relates to significant elements of the case, professional misconduct.* Moreover, it is fundamentally unfair to an opposing party to allow an attorney with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching a result."
>
> (Emphasis supplied).

Moreover, the *ABA Standards, the Prosecution Function,* § 5.5 provide that:

> "In his opening statement the prosecutor should confine his remarks to evidence he intends to offer which he believes in good faith will be available and admissible and a brief statement of the issues of the case. *It is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted in evidence.*"
>
> (Emphasis supplied).

The instant prosecutor's reference in his opening remarks to Schulz' testimony, which testimony he could not *reasonably* have believed would be forthcoming at trial. This constitutes prosecutorial misconduct; nonetheless, the Third Circuit Panel which decided this case did not disclose its basis for concluding that this claim lacked merit. The parties in this case and others who read the opinion and record cannot tell whether the Panel has concluded that there was error, whether they concluded that the error was harmless, or whether they decided that the reasoning in *DeRosa* was faulty and should not be followed. Thus, this Court should issue a writ of certiorari to review the question and to correct such an excess in the conduct of a federal prosecutor.[10]

The Constitutional aspect of this issue arises where an opening statement places before the jury facts or evidence

10. The case at bar is distinguishable from *Frazier v. Cupp,* 394 U. S. 731 (1969), wherein the Court found *no* prosecutorial misconduct, even though the prosecutor included in his opening statement the expected testimony of a witness who later asserted his privilege against self-incrimination when called to testify, because the record there showed that the prosecutor *acted in good faith and reasonably expected said witness to testify.* Note also that in *Frazier v. Cupp,* the prosecutor involved was of state and not federal origin.

that a defendant cannot test by cross-examination because the witness has refused to be examined on the critical matters related. See *Frazier v. Cupp, supra; United States v. West,* 486 F. 2d 468 (6th Cir. 1973), *cert. denied,* 416 U. S. 955 (1974).

The deprivation of confrontation rights presented in the instant case is clearly more exacerbated than in either *Frazier* or *West.* In *Frazier,* the witness alluded to in the government's opening did in fact take the stand at trial, but in response to relevant questions asserted his Fifth Amendment privilege. In *West,* the witness alluded to in the government's opening likewise took the stand, and in fact gave substantive testimony, though this testimony did not fully conform with that summarized by the prosecutor's opening. In both *Frazier* and *West,* the witnesses mentioned by the prosecutors in their openings *did take the stand at trial, and hence were available for cross-examination.* In the instant case, Rosemary Schulz never took the witness stand, and hence the Petitioner was literally deprived of *all opportunity* for cross-examination and confrontation. This factor makes the instant case much more suspect on confrontation grounds than either *Frazier* or *West.*

Accordingly, this Honorable Court should issue a writ of certiorari to decide this significant constitutional "confrontation" issue arising in a context that is often recurring and of crucial importance to the criminal bar.

CONCLUSION.

For all the foregoing reasons, this Petition for Writ of Certiorari should be granted as to each of the questions presented herein.

Respectfully submitted,

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Attorney for Petitioner Pierorazio.

MICHAEL A. SEIDMAN
Attorney for Petitioner Capps.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1626
No. 77-1632

UNITED STATES OF AMERICA

v.

PIERORAZIO, FRANK
Appellant in 77-1626

(D. C. Crim. No. 76-480-1)

UNITED STATES OF AMERICA

v.

CAPPS, JESSE
Appellant in 77-1632

(D. C. Crim. No. 76-480-3)

Argued March 27, 1978

Before: HUNTER, WEIS and GARTH, *Circuit Judges*

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OPINION OF THE COURT

(Filed May 31, 1978)

GARTH, *Circuit Judge*:

Defendants Frank Pierorazio and Jessie Capps were charged in a thirteen count indictment with one count of conspiracy to distribute methamphetamine (a Schedule II controlled substance) in violation of 21 U. S. C. § 846, and with several counts [1] of violating 21 U. S. C. § 843(b) by using a communication facility to facilitate the felony of possession and distribution of controlled substances (in violation of 21 U. S. C. § 841(a)), and of attempts to so possess and distribute (in violation of 21 U. S. C. § 846). After their first jury trial in January, 1977 ended in a hung jury, Pierorazio and Capps were retried on the conspiracy count, and Pierorazio was retried on two counts of violating 21 U. S. C. § 843(b).[2] The Government's evidence at trial consisted almost entirely of tape recorded telephone conversations intercepted under court order, and of expert

1. Capps was charged in one count and Pierorazio in ten separate counts.

2. 21 U. S. C. § 843(b) is quoted in full in the text below.

testimony interpreting those conversations. The jury returned a verdict of guilty on all counts, and the district court entered judgments of conviction accordingly. Capps was sentenced to a two year term of imprisonment followed by a Special Parole term of two years. Pierorazio was sentenced to a three and one-half year term of imprisonment, followed by two years Special Parole, on the conspiracy count, and the same sentence on each substantive count, to be served concurrently with each other and with the sentence on the conspiracy count. Both defendants appealed.

I

Pierorazio argues on appeal that his convictions under 21 U. S. C. § 843(b), using a communications facility in the facilitation of certain felonies under subchapters I and II of Chapter 13, Title 21, United States Code, may not be sustained. He contends that the evidence adduced by the Government is insufficient to show *actual* distribution or possession, and that an actual accomplished distribution or possession must be proved in order to support a conviction for facilitation under § 843(b). In other words, it is Pierorazio's position that proof of an underlying inchoate crime, such as attempt or conspiracy to distribute controlled substances or to possess controlled substances with intent to distribute, does not suffice to support a facilitation conviction under § 843(b), and that proof of an underlying actual, consummated substantive offense is necessary. Assuming *arguendo* that the evidence is insufficient to show actual distribution or possession with intent to distribute, and at best is sufficient to show a conspiracy or an attempt to distribute or possess with intent to distribute, we must nevertheless reject appellant's contention.[3]

3. Pierorazio also contends that, even if an attempt could be the underlying felony required for a § 843(b) conviction, the evi-

The predecessor of 21 U. S. C. § 843(b) was former 18 U. S. C. § 1403(a) (repealed Pub. L. 91-513, Title III, § 1101(b)(1)(A), Oct. 27, 1970, 84 Stat. 1292). That section provided:

> (a) Whoever uses any communication facility in committing or in causing or facilitating the commission of, or in attempting to commit, any act or acts constituting an offense or a conspiracy to commit [various substantive narcotics offenses] shall be imprisoned not less than two and not more than five years, and, in addition, may be fined not more than $5,000. Each separate use of a communication facility shall be a separate offense under this section.

Thus, it was a federal crime to use a communications facility: (1) "in committing" any of the specified narcotics offenses; (2) "in causing or facilitating the commission" of any of those offenses; (3) "in attempting to commit" any of those offenses; and (4) in "a conspiracy to commit" any of those offenses.

Section 1403(a) was repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, and was replaced by a revised version, Pub. L. 91-513, Title II, § 403(b), 84 Stat. 1263, *codified at* 21 U. S. C. § 843(b). That section provides:

> It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

3. (Cont'd.)
dence was insufficient to show attempt to distribute or to possess with intent to distribute. We reject this contention as well, having carefully examined the record and having concluded that the evidence was indeed sufficient to support a finding of attempt.

Appellant's argument focuses on the fact that Congress, in revising the communication-facilitation statute at issue here, omitted the language "or in attempting to commit [the specified criminal acts]", and the language "or a conspiracy to commit [the specified offenses]." He urges in this regard that we accept the reasoning of *United States v. Leslie*, 411 F. Supp. 215 (D. Del. 1976), and *United States v. Harrington*, Slip Op., Crim. No. 77-86 (E. D. Pa. Feb. 23, 1978). The district courts in those cases held that Congress, by omitting the language found in former 18 U. S. C. § 1403(a) relating to *attempt* and *conspiracy*, yet by closely tracking the language of § 1403(a) in other respects, intended to restrict 21 U. S. C. § 843(b) to the facilitation of consummated crimes, and accordingly intended to omit from that statute the facilitation offense when the underlying felony consisted merely of the inchoate crimes of attempt or conspiracy. *See* 411 F. Supp. at 216-17.[4]

4. The district courts in *Leslie* and *Harrington* also relied in part on what they perceived to be an anomalous result if § 843(b) were construed to allow conviction when the underlying felony was an inchoate one. They noted that if, for example, nine telephone conversations were charged as violating § 843(b), each one of which would be a separate offense, the defendant would be exposed to 36 years imprisonment. *See* 21 U. S. C. § 843(c). Yet if the defendant were charged with an actual distribution, he would only be subject to a prison term of five years. If no actual distribution took place, limiting prosecution to 21 U. S. C. § 846 (*i.e.* not

We cannot accept the analysis contained in *Leslie* and *Harrington*. We believe that the approach in those two cases ignores the plain language of the statute as well as the fact that 21 U. S. C. § 846 was passed contemporaneously with the passage of § 843(b) and the repeal of former 18 U.S.C. § 1403(a).[5]

Section 843(b) makes criminal the use of a telephone "in committing, or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter [subchapter I] or subchapter II of this chapter [Chapter 13 of Title 21]." Included within subchapter I is § 846, which makes it a felony for a person to *attempt* or *conspire* to commit any offense defined in subchapter I (such as distribution or possession with intent to distribute, defined as offenses in § 841). In other words, *attempt to distribute* a controlled substance, *conspiracy to distribute* a controlled substance, *attempt to possess* a controlled substance with intent to distribute it, and *conspiracy to possess* a controlled substance with intent to distribute it, are all felonies under provisions of subchapter I. As such, they are plainly included within the terms of § 843(b). We can discern nothing in the legislative history,[6] nor has any policy been advanced, which would call for a different result.[7] Hence, the fact that particular language found in former § 1403(a) was thereafter omitted from § 843(b) does not persuade us that Congress intended to preclude a § 843(b) facilitation conviction where the underlying felony is attempt or conspiracy under § 846.

In sum, we hold that proof of an underlying inchoate crime, such as attempt or conspiracy under § 846, is sufficient to sustain a facilitation conviction under § 843(b). It is therefore not necessary that an actual, consummated distribution be shown. In reaching this result, we are in accord with all other courts of appeals which have considered this question. *E.g., United States v. Losing*, 560 F. 2d 906 (8th Cir.), *cert. denied*, 46 U. S. L. W. 3357 (U. S. Nov. 29, 1977) (No. 77-591); *United States v. Rodriguez*, 546 F. 2d 302 (9th Cir. 1976); *United States v. Turner*, 528 F. 2d 143, 165 (9th Cir. 1976), *cert. denied*, 46 U. S. L. W. 3218 (U. S. Oct. 4, 1977) (No. 77-33); *United States v. Steinberg*, 525 F. 2d 1126 (2d Cir.), *cert. denied*, 425 U. S. 971 (1975). *See United States v. Kirk*, 534 F. 2d 1262 (8th Cir. 1976), *cert. denied*, 430 U. S. 906 (1977); *United States v. Sisca*, 503 F. 2d 1337 (2d Cir. 1974) (both *Sisca* and *Kirk* affirmed § 843(b) convictions where the underlying felony was conspiracy under § 846; neither discussed the question presented here). *See also*

4. (Cont'd.)
permitting a facilitation conviction) would limit the defendant's punishment to five years, which is the maximum sentence authorized for actual distribution. *See* 411 F. Supp. at 217. The court reasoned that this result would serve "to substantially ameliorate the potential penalty for individuals who make a number of telephone calls but never succeed in accomplishing the primary societal evil against which the narcotics laws are aimed." *Id.*

We reject this reasoning. As the Government properly points out, the fact that each conversation is a separate offense "provides no sound basis for distinguishing between completed distributions, attempts, and conspiracies in determining the coverage of the statute." Government's Brief at 43 n. 30. If nine phone calls were made, the defendant would be subject to 36 years exposure under § 843(b), regardless of whether the distribution took place or whether it was never consummated.

5. We receive no guidance in our interpretation of § 843(b) from the sparse legislative history of that section. *See* H. R. Rep. No. 91-1444, 91st Cong., 2d Sess. (1970), *reprinted in* 3 [1970] U. S. Code Cong. & Admin. News 4566, 4616.

6. *See* note 4 *supra*.

7. It may be, as the *Harrington* court pointed out, that some states have enacted criminal facilitation statutes which require that the underlying felony actually be consummated (*i.e.* inchoate crimes may not support a facilitation conviction). *E.g.*, N. Y. Penal Law §§ 115.00-115.15. Absent any indication that Congress intended to adopt such an approach in § 843(b), we must follow the plain import of the statutory language.

United States v. Jones, 545 F. 2d 1112 (8th Cir. 1976), *cert. denied*, 96 S. Ct. 814 (1977).

Thus the district court did not err in denying Pierorazio's pre- and post-trial motions in this respect.

II

Appellants Pierorazio and Capps have raised several other contentions on appeal. Specifically, they claim:

(1) that the interception of telephone communications by Government agents violated federal law in several respects, *viz*, that the warrants for the two authorized interceptions failed to establish probable cause; that the wiretap applications failed to establish that normal investigative techniques had been tried or appeared unlikely to succeed; and that the integrity of the tapes had not been preserved since they were not properly sealed or promptly filed with the court;

(2) that the trial judge erred in failing to grant a judgment of acquittal at the close of the first trial;

(3) that the evidence was insufficent to show the existence of a conspiracy to possess and distribute methamphetamine, as charged in the indictment;

(4) that the trial court erred in permitting the jury to listen to tape recorded conversations of persons other than defendants, relating to incidents which were not charged in the indictment, and which related to counts which had been dismissed or overt acts which had been stricken;

(5) that the trial court erred in permitting the jury to use transcripts of tape recorded conversations prepared by the Government [8];

8. The jury had been permitted to use the transcripts as an aid to following the tapes, but had not been permitted to take the transcripts into the jury room.

(6) that the trial court erred in refusing to grant a mistrial where the prosecutor referred in his opening speech to damaging and prejudicial testimony of a witness he had reason to know intended to refuse to testify;

(7) that the trial court erred in limiting the cross-examination of a key Government witness;

(8) that the trial court erred in permitting a Government agent to testify to his interpretation of words overheard on tape recordings where he was not properly qualified as an expert on the subject; and

(9) that the trial court errd in refusing a mistrial after the prosecutor; in his closing speech, referred to the failure of appellants to testify or produce evidence.

Having fully reviewed the record in this case, and having carefully considered all the appellants' contentions, we conclude that these claims are without merit.

III

The judgments of conviction will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-1626 and 77-1632

UNITED STATES OF AMERICA

v.

PIERORAZIO, FRANK,
Appellant in No. 77-1626

(D. C. Criminal No. 76-480-1)

UNITED STATES OF AMERICA

v.

CAPPS, JESSE,
Appellant in No. 77-1632

(D. C. Criminal No. 76-480-3)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: HUNTER, WEIS and GARTH, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on March 27, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, filed April 25, 1977, be, and the same are hereby affirmed.

ATTEST:

THOMAS F. QUINN
Clerk

May 31, 1978

APPENDIX B.

UNITED STATES DISTRICT COURT
for
EDPA

Docket No. Crim. 76-480-1

UNITED STATES OF AMERICA

v.

FRANK PIERORAZIO

Defendant

Judgment and Probation/Commitment Order.

In the presence of the attorney for the government the defendant appeared in person on this date April 22, 1977 with counsel Stanford Shmukler.

There being a verdict of guilty, Defendant has been convicted as charged of the offense(s) of Conspiracy, Illegal use of communications facility. 21 USC 846, 843(b).

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 3½ years on Count 1. In addition to the term of imprisonment there is imposed a Special Parole term of 2 years to begin at the expiration of the term of imprisonment. On Count 11 It Is Adjudged that the defendant

is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 3½ years. On Count 12 It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 3½ years. The terms of imprisonment on Counts 11 and 12 are to run concurrently with the sentence imposed on Count 1.

The Defendant is to surrender to the U. S. Marshal on May 2, 1977 on or before 12:00 Noon, to begin the sentence of imprisonment if an appeal is not taken by that date.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U. S. Marshal or other qualified officer.

2 cc Marshal
1 cc Prob.
1 c S. Shmukler
1 c J. D. McCullough

Signed by U. S. District Judge

Donald W. VanArtsdalen, *J.*

Date April 22, 1977

UNITED STATES DISTRICT COURT
for
EDPA

Docket No. Crim. 76-480-3

UNITED STATES OF AMERICA

v.

JESSE CAPPS

Defendant

Judgment and Probation/Commitment Order.

In the presence of the attorney for the government the defendant appeared in person on this date April 22, 1977 with counsel Michael Seidman.

There being a verdict of guilty, Defendant has been convicted as charged of the offense(s) of Conspiracy. 21 USC 846.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 2 years on Count 1. In addition to the term of imprisonment there is imposed a Special Parole term of 2 years to begin at the expiration of the term of imprisonment. The Defendant is to surrender to the U. S. Marshal, U. S. Federal Courthouse, Philadelphia, Pa. on May 2, 1977 on or before 12:00 Noon, to begin the sentence of imprisonment if an appeal is not taken by that date.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U. S. Marshal or other qualified officer.

2 cc Marshal
1 cc Prob.
1 c M. Seidman
1 c J. D. McCullough

Signed by U. S. District Judge

DONALD W. VANARTSDALEN, *J.*

Date April 22, 1977

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1626
77-1632

UNITED STATES OF AMERICA

v.

PIERORAZIO, FRANK
Appellant in 77-1626

UNITED STATES OF AMERICA

v.

CAPPS, JESSE
Appellant in 77-1632

Sur Petition for Rehearing.

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, and HIGGINBOTHAM, *Circuit Judges.*

The petition for rehearing filed by

Frank Pierorazio,
Appellant in 77-1626

Jesse Capps
Appellant in 77-1632

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

LEONARD I. GARTH,
Judge

Dated: June 27, 1978

APPENDIX D.

SUPREME COURT OF THE UNITED STATES

No. A-69

FRANK PIERORAZIO, ET AL.,
Petitioners,

v.

UNITED STATES

Order Extending Time to File Petition for Writ of Certiorari.

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 26, 1978.

/s/ WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme Court of the United States

Dated this 19th day of July, 1978.

Supreme Court, U. S.
FILED
NOV 1 1978
MICHAEL RODAK, JR., CLERK

No. 78-324

In the Supreme Court of the United States

OCTOBER TERM, 1978

FRANK PIERORAZIO and JESSE CAPPS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JEROME M. FEIT
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Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-324

FRANK PIERORAZIO and JESSE CAPPS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 578 F.2d 48.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1978 (Pet. App. A10-A11). A petition for rehearing was denied on June 27, 1978 (Pet. App. A16-A17). Mr. Justice Brennan extended the

time for filing a petition for a writ of certiorari to and including August 26, 1978, and the petition was filed on August 25, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioners' conspiracy convictions.

2. Whether 21 U.S.C. 843(b) applies to the use of a telephone to facilitate an attempt or a conspiracy to distribute controlled substances.

3. Whether the affidavit in support of the application for an order authorizing a wire interception was insufficient because it incorporated by reference a prior affidavit of another government agent involved in the investigation.

4. Whether the application for the order authorizing the wire interception sufficiently established that other investigative methods were inadequate or unlikely to succeed.

5. Whether the tapes of the monitored conversations should have been excluded on grounds of failure of the government to present them for immediate sealing as required by 18 U.S.C. 2518(8)(a).

6. Whether the prosecutor's reference in his opening statement to the anticipated testimony of a witness who later refused to testify requires reversal of petitioners' convictions.

STATEMENT

Following a second jury trial [1] in the United States District Court for the Eastern District of Pennsylvania, both petitioners were convicted of conspiring to distribute a controlled substance, methamphetamine, in violation of 21 U.S.C. 846. In addition, petitioner Pierorazio was convicted on two counts of using a communication facility (a telephone) to facilitate the distribution and attempted distribution of controlled substances, in violation of 21 U.S.C. 843(b). On the conspiracy count, petitioner Pierorazio was sentenced to three and one-half years' imprisonment to be followed by two years' special parole, and petitioner Capps was sentenced to two years' imprisonment and two years' special parole. On the two Section 843(b) counts, Pierorazio received sentences of three and one-half years' imprisonment, both to be served concurrently with his sentence on the conspiracy count. The court of appeals affirmed (Pet. App. A1-A9).

On June 1, 1976, based upon a finding that probable cause existed to believe that petitioner Pierorazio was using a telephone at 31 East Wildey Street in Philadelphia in conspiring to distribute methamphetamine, the district court authorized agents of the Drug Enforcement Administration (DEA) to monitor conversations on that telephone (A. 11a-12a).[2] It was

---

[1] The jury could not reach a verdict after the first trial (Pet. App. A2).

[2] "A." refers to the appendix filed by petitioners in the court of appeals. We are lodging a copy of this appendix with the Clerk of this Court.

soon discovered that through the use of a switching service provided by the telephone company that great majority of the calls coming into the East Wildey Street telephone were being diverted to Pierorazio's home telephone on Tulip Street in Philadelphia (A. 82a-83a). Once transferred, these conversations could not be monitored by the agents conducting the interception of the East Wildey Street telephone (*ibid.*). Consequently, a second interception authorization was obtained to permit the monitoring of the telephone at Pierorazio's residence (A. 65a-68a).

In these conversations, which were generally conducted in the guarded idiom of the drug trade,[3] Pierorazio and Capps discussed their methamphetamine distribution operation, and Pierorazio made numerous arrangements to buy, sell, and trade methamphetamine (A. 967a-1023a).

ARGUMENT

1. Petitioners contend that the evidence was insufficient to establish that the object of their conspiracy was to distribute methamphetamine, as charged in the indictment, rather than some other substance (Pet. 15-17).

[3] The government presented the expert testimony of DEA Special Agent Ellis M. Hershowitz to explain to the jury the meaning of some of the drug terminology used in the conversations.

This contention is without merit. Although no methamphetamine was seized from petitioners during the course of the conspiracy, it is settled that a drug distribution conspiracy may be proved even though the government has not actually seized the drugs involved. *United States* v. *Quesada*, 512 F.2d 1043 (5th Cir.), cert. denied, 423 U.S. 946 (1975). Indeed, a conspiracy may exist even if the participants do not succeed in their goal to obtain and distribute controlled substances. See *United States* v. *Mitchell*, 556 F.2d 371 (6th Cir. 1977).

Petitioners' monitored conversations introduced at trial contained ample proof that they were engaged in the distribution of methamphetamine, rather than any other controlled substance. In the conversations, the quantity of the drug to be delivered is frequently referred to in terms of "lines" or "T's", and while the term "line" is used in connection with either methamphetamine or cocaine, the evidence established that the term "T" (originally meaning a level teaspoon) is normally used to refer to methamphetamine alone (Tr. 322-323, 387, 450).[4] Moreover, the government expert testified that the term "meth" (used by a customer in referring to Pierorazio's product) is never used to refer to anything but meth-

[4] The fact that the substance involved was methamphetamine, rather than cocaine, is also shown by a conversation in which Pierorazio and his caller contrasted "Big C", or cocaine, which was readily available around town with "the regular stuff" that Pierorazio could not then provide (Tr. 333; A. 975a-976a).

amphetamine (Tr. 403-404; A. 1006a). Accordingly, the court of appeals properly rejected petitioners' claim of insufficiency in the evidence (Pet. App. A8). This factual determination does not merit further review. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).[5]

2. Pierorazio also asserts that his convictions on two counts of violating 21 U.S.C. 843(b)—which proscribes the use of a communications facility (here, a telephone) in facilitating the commission of certain narcotics felonies—must be reversed because the evidence was insufficient to show that the specific distributions discussed over the telephone were in fact consummated (Pet. 12-15).[6] We do not agree that the evidence is insufficient to show that the operation involved the actual distribution of methamphetamine, and the court of appeals did not so hold (Pet. App. A3).

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[5] Petitioners' claim (Pet. 16-17) that the decision below conflicts with *United States* v. *Cooper*, 567 F.2d 252 (3d Cir. 1977), is incorrect. *Cooper* involves the application of the rule that once a conspiracy has been shown to exist, only slight evidence of a defendant's participation may suffice to establish his complicity in the conspiracy beyond a reasonable doubt. Petitioners suggest only that the commodity they were distributing was not proven; they do not deny that their participation in the scheme was sufficiently established by the intercepted calls revealing their central position in the conspiracy. Consequently, this case does not involve the "slight evidence" rule.

[6] The sentences on these convictions were concurrent with the sentence on the conspiracy count, which is unaffected by this claim.

The contention is, in any event, without merit. Section 843(b) prohibits the use of the telephone in facilitating inchoate crimes like attempts and conspiracies as well as consummated offenses. It is not significant that 18 U.S.C. (1964 ed.) 1403(a) (70 Stat. 573), the predecessor of Section 843(b), referred specifically to attempts and conspiracies, while Section 843(b) does not. As the court below explained (Pet. App. A6-A7; emphasis in original; footnotes omitted):

> Section 843(b) makes criminal the use of a telephone "in committing, or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter [subchapter I] or subchapter II of this chapter [Chapter 13 of Title 21]." Included within subchapter I is § 846, which makes it a felony for a person to *attempt* or *conspire* to commit any offense defined in subchapter I (such as distribution or possession with intent to distribute, defined as offenses in § 841). In other words, *attempt to distribute* a controlled substance, *conspiracy to distribute* a controlled substance, *attempt to possess* a controlled substance with intent to distribute it, and *conspiracy to possess* a controlled substance with intent to distribute it, are all felonies under provisions of subchapter I. As such, they are plainly included within the terms of § 843(b). We can discern nothing in the legislative history, nor has any policy been advanced, which would call for a different result. Hence, the fact that particular language found in former § 1403(a) was there-

after omitted from § 843(b) does not persuade us that Congress intended to preclude a § 843 (b) facilitation conviction where the underlying felony is attempt or conspiracy under § 846.

This interpretation of Section 843(b) is in accord with the analysis of all other courts of appeals that have considered this question. See *United States* v. *Losing*, 560 F.2d 906, 913 (8th Cir.), cert. denied, 434 U.S. 969 (1977); *United States* v. *Rodriguez*, 546 F.2d 302, 307-308 (9th Cir. 1976); *United States* v. *Steinberg*, 525 F.2d 1126, 1133 (2d Cir. 1975), cert. denied, 425 U.S. 971 (1976); see also *United States* v. *Kirk*, 534 F.2d 1262 (8th Cir. 1976), cert. denied, 430 U.S. 906 (1977); *United States* v. *Sisca*, 503 F.2d 1337 (2d Cir.), cert. denied, 419 U.S. 1008 (1974).[7]

3. Petitioners argue that their monitored conversations should have been suppressed because an affidavit in support of a wire interception application may not incorporate by reference a prior affidavit by another law enforcement officer, and, absent recourse to this earlier affidavit, the application for the second interception order in this case failed to set forth facts establishing probable cause (Pet. 17-19).

It is well established that "[o]bservations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number." *United States* v. *Ventresca*, 380 U.S. 102, 111 (1965). Accordingly,

[7] As petitioners note (Pet. 14), the court of appeals in this case rejected the contrary conclusions of two district courts in its own circuit (Pet. App. A5-A6). That rejection does not establish a conflict warranting review by this Court.

it was perfectly proper for Agent Fekete of the DEA, the affiant supporting the application for the interception at Pierorazio's residence, to rely on the information provided by a fellow agent in the affidavit filed in support of the prior East Wildey Street interception. See *United States* v. *McCoy*, 478 F.2d 176 (10th Cir. 1973). The fact that Agent Fekete, in addition to summarizing new evidence obtained in the investigation, simply incorporated by reference the prior affidavit rather than setting out its entire content afresh, is immaterial. See *United States* v. *Landmesser*, 553 F.2d 17, 21 (6th Cir. 1977).[8]

[8] Petitioners also suggest (Pet. 17-18) that the second affidavit contained material misrepresentations. Agent Fekete did state at the suppression hearing that a subsequent review of the tapes of the original intercept led him to alter his analysis of the two conversations described in the affidavit to some extent (Tr. 140-145, 147-148; A. 221a-226a, 228a-229a). It is not clear that this re-evaluation would deprive the conversations of the significance attributed to them in the affidavit. Compare Tr. 27-28, A. 183a-184a and Tr. 144, A. 225a with Tr. 148-149, A. 229a-230a (the first conversation); compare Tr. 162, A. 243a with Tr. 152-153, A. 233a-234a (the second conversation). In any event, the entirely accurate statement in the affidavit that the calls on the originally intercepted telephone were being automatically transferred to the telephone for which interception authority was sought was sufficient, with the original affidavit that was incorporated by reference, to constitute probable cause for the issuance of the second authorization. The two additional calls reported were thus not necessary to the sufficiency of the affidavit. There is no indication that the inaccuracies in the affidavit were the result of deliberate falsehood or a reckless disregard for the truth. Accordingly, under *Franks* v. *Delaware*, No. 77-5176 (June 26, 1978), petitioners were not even entitled to a hearing on their claim that the warrant contained misrepresentations. They

4. Petitioners next contend that the applications for electronic surveillance did not satisfy the requirements of 18 U.S.C. 2518(1)(c) because they did not explain whether "other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

The record refutes this claim. The affidavits reveal a history of physical surveillance of Pierorazio and his associates, utilization of a number of informants, and analysis of telephone toll records. While these conventional methods had succeeded in disclosing that Pierorazio and others were dealing in controlled substances, they had failed to reveal the entire scope of the conspiracy or produce sufficient evidence for a successful prosecution. The affidavits pointed out why these methods were unsuccessful: The confidential informants and witnesses described in the affidavit had refused to testify in court (A. 41a); infiltration by undercover agents was not possible because Pierorazio dealt only with close associates (*ibid.*); and the execution of search warrants would not identify Pierorazio's co-conspirators or sources of supply (*ibid.*). The affidavits further informed the court that the conspirators were alert to the possibility of surveillance (citing at least one instance of overt counter-surveillance activity (A. 84a)), and pointed out that, in any event, continued visual surveillance would not disclose direct evidence of the drug deal-

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nevertheless were permitted to explore this matter fully at the hearing on the motion to suppress, and the district court concluded that their attack on the affidavit was without merit.

ings conducted inside the premises (A. 41a, 84a-85a).[9]

Petitioners assert (Pet. 20-22) that the circuits have adopted different standards for determining compliance with 18 U.S.C. 2518(1)(c). Whether or not this is true at the present time, the affidavits involved here, which contain detailed factual allegations concerning the alternative techniques attempted and why they were unsuccessful in this particular case, are clearly sufficient to meet the most stringent interpretation of Section 2518(1)(c). Accordingly, even assuming there is some difference in the standards used, this case does not directly present that issue.[10]

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[9] Relying on *Calhoun* v. *State*, 34 Md. App. 365, 367 A.2d 40 (Ct. Spec. App. 1977), petitioners also make the argument that because a prior affidavit was incorporated by reference, the government did not meet the statutory requirement of Section 2518(3)(c). In *Calhoun*, however, the court simply held that where the new affidavit did not even allege that normal investigation means would be ineffective, the statutory requirement was not met by the incorporation in it of a prior affidavit making that allegation as to a different interception at a different time. That defect is not present here. Agent Fekete's affidavit not only contained the required allegation, but it also contained additional facts showing the necessity for the interception (A. 81a-85a). The prior affidavit was properly incorporated to show additional facts supporting Fekete's allegations.

[10] As we have frequently noted in our filings in this Court (see, *e.g.*, *Berlin* v. *United States*, No. 77-548, cert. denied, 434 U.S. 1012 (1978); *Stone* v. *United States*, No. 77-690, cert. denied, 434 U.S. 1064 (1978)), the Ninth Circuit in *United States* v. *Kalustian*, 529 F.2d 585 (1975), appeared to require more specificity in supporting affidavits than has been required by other circuits. But *Kalustian* has not been accepted

5. Petitioners also contend (Pet. 22-25) that their monitored conversations should have been suppressed because the government failed to make the recordings available for judicial sealing "[i]mmediately upon the expiration of the * * * order" as required by 18 U.S.C. 2518(8)(a).

There was, however, no delay in sealing the tapes at issue here.[11] The interception of Pierorazio's telephone concluded at 8:00 p.m. on Friday, July 2, 1976 (A. 98a). Immediately following the three-day holiday weekend, the tapes were evidently prepared for judicial sealing on July 6, and the district judge sealed them on July 7 (A. 108a). Thus, only one work day, and less than five days in all, intervened between the expiration of the interception order and the sealing of the tapes.[12] This was substantial com-

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by any other circuit, or even consistently followed in the Ninth Circuit. In *United States* v. *Spagnuolo*, 549 F.2d 705 (9th Cir. 1977) that circuit retreated somewhat from the *Kalustian* standard, and it is not clear that the Ninth Circuit will continue occasionally to apply a more stringent standard than is utilized by the other circuits. In any event, this Court has declined numerous requests to review decisions alleged to be in conflict with *Kalustian*. See, *e.g.*, *Berlin* v. *United States*, *supra*; *Stone* v. *United States*, *supra*, and cases cited in our oppositions therein. Nothing has happened recently to justify any change in this refusal to review what is, at heart, an intra-circuit conflict of little continuing importance. Cf. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

[11] No tapes made pursuant to the original authorization were presented at trial; therefore, there is no need to consider whether those tapes were promptly sealed.

[12] The district court, in denying petitioners' suppression motion, specifically ruled that "there is insufficient evidence to warrant a finding that the integrity of the tapes of the intercepted communications which the government seeks to have admitted has been violated or that the tapes have in any manner been tampered with or altered" (A. 158a). During the interval between the expiration of the intercept and judicial sealing, the tapes were carefully protected. They were initialed and heat sealed in evidence bags when removed from the recorder, then kept in a locked cabinet in Agent Fekete's office to which no other agent had access (A. 651a-657a).

pliance with Section 2518(8)(a). *United States* v. *Sklaroff*, 506 F.2d 837, 840-841 (5th Cir.). cert. denied, 423 U.S. 874 (1975) (14-day delay in sealing constitutes substantial compliance); *United States* v. *Canon*, 404 F. Supp. 841, 849 (N.D. Ala. 1975) (seven-day delay in sealing constitutes substantial compliance).[13]

6. Petitioners' final contention is that their convictions should be reversed because the prosecutor, in his opening statement, adverted to the testimony of a potential witness who he could not reasonably have expected to testify at trial (Pet. 26-29).

During his opening statement the prosecutor stated (Tr. 16):

> And it's also the Government's expectation that you will hear at least one of the participants in the telephone calls, other than Mr. Capps and Mr. Pierorazio, a person by the name of Rosemarie Schulz, testify as to her involvement in a particular telephone call with the defendant Frank Pierorazio.

Even though she was granted immunity, however,

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[13] In *United States* v. *Gigante*, 538 F.2d 502 (2d Cir. 1976), upon which petitioners rely, the court properly suppressed tapes where sealing delays ranged from 8 to 13 months.

Schulz refused to testify.[14] For this conduct she was held in contempt and jailed by the trial judge (Tr. 246-252).

Petitioners' argument that the prosecutor could not reasonably have expected Schulz to testify is refuted by the record. Schulz herself had pleaded guilty to distributing methamphetamine on May 3, 1976, and, in conjunction with a plea bargain in that case, had agreed to testify (and had testified) in a related probe of police corruption (Tr. 166-182). Indeed, in a meeting one month prior to trial, Schulz had informed the prosecutor that she would testify if granted immunity because she "wouldn't go to jail, even for one day, for somebody else" (G. Ex. 21; A. 793a). In light of this information and the grant of immunity, the prosecutor had every reason to believe that Schulz would, in fact, testify.

Moreover, it is well established that a new trial is not required whenever the prosecutor's opening remarks are not supported in every detail by evidence presented at trial. *Frazier* v. *Cupp*, 394 U.S. 731 (1969); *Mares* v. *United States*, 409 F.2d 1083, 1085 (10th Cir. 1968), cert. denied, 394 U.S. 963 (1969); cf. *United States* v. *Leftwich*, 461 F.2d 586, 590 (3d Cir.), cert. denied, 409 U.S. 915 (1972). Many things may happen during the course of a trial to prevent the presentation of all the expected evidence by the government. A witness's contumacious refusal to testify

[14] Schulz indicated that she was afraid to testify because of the possibility that she would suffer physical harm (Tr. 181-183).

is one of those things. But variances between the opening statement and the evidence actually introduced, like other improprieties of argument, do not require a new trial unless the discrepancies are "so gross as probably to prejudice the defendant and the prejudice has not been neutralized by the trial judge before submission of the case to the jury." *United States* v. *Leftwich*, *supra*, 461 F.2d at 590. The trial judge here properly instructed the jury that the case was to be decided on the evidence, which "does not include arguments or statements of counsel" (Tr. 679-681; see also Tr. 17).[15] See *Frazier* v. *Cupp*, *supra*, 394 U.S. at 736. Under these circumstances, the courts below properly refused to grant petitioners a new trial because of the brief reference by the prosecutor to Schulz's expected testimony.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[15] No request was made for a specific instruction to disregard the portion of the opening statement pertaining to Schulz's expected appearance.

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